

MASSACHUSETTS

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

FY 2005 Massachusetts Community Development Block Grant Program

Architectural Barrier Removal Technical Assistance Guide

January 2005



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ARCHITECTURAL BARRIER REMOVAL

Introduction

The 1990 Americans with Disabilities Act (ADA) was the first, significant civil rights law passed by Congress since the Civil Rights Acts of the 1960's and early 1970's. ADA imposed sweeping mandates on government agencies from the federal level down to rural town halls and also set standards for privately owned "places of public accommodation" - restaurants, movie theatres, hotels, office complexes, service centers, retail shops, museums -- all toward the common goal of ensuring equal access to services and programs for severely disabled adults.

A key distinction between ADA and predecessor civil rights laws is that ADA provides a set of architectural specifications which, if fully met, confer a presumption of statutory compliance on affected public and private entities. Simply stated, if a company builds a new facility that meets *all* of the design standards of the Americans with Disabilities Act Accessibility Guidelines (ADAAG), it should be able to withstand a court challenge under Title III of the Act. (Title III governs places of public accommodation.) This is because the U.S. Justice Department will find that *for the purposes of providing an architecturally barrier-free environment*, the company has met its legal burden.

However, most ADA compliance problems do not involve newly constructed facilities. This is especially true in Massachusetts, where regulations of the state Architectural Access Board (AAB) are essentially equal to if not more stringent than ADAAG. For cities and towns trying to bring themselves into compliance with a law whose ramifications are still unclear to many, the problem is almost never a new building. Instead, it involves existing structures that provide public services of one kind or another -- a town hall, a senior center, a community or neighborhood facility, a school. Since Title II of ADA requires government entities to prepare a Transition Plan and make all "readily achievable access" improvements to existing structures, deciding what and when something becomes "readily achievable" is where many local disagreements and misunderstandings begin.

As if to make things just a bit more complicated, nearly every community was already mandated to make certain services and programs accessible long before Congress enacted ADA. This is because the use of federal funds to build or improve public buildings, and to finance services or programs contained in public buildings, were to have already triggered compliance with Section 504 of the Rehabilitation Act of 1973. Frequently communities completed the necessary self-assessments required by Section 504 but never made any architectural access improvements to their facilities. Such communities are not necessarily out of compliance as far as CDBG is concerned; CDBG simply requires that municipal programs and services be equally accessible. Such compliance can be achieved "programmatic access," which includes both the physical relocation of services or programs into areas of existing buildings that were barrier-free, or restructuring the manner in which services are delivered so that they are accessible to all. If programmatic

access can be readily achieved no further barrier removal activities may be necessary, or eligible. To ensure that proposed activities are in fact eligible it is important that applicants fully address programmatic access in their responses to questions 4(a), (b) and (c).

CDBG is one of the few non-local public resources available to help pay for Architectural Barrier Removal in public and private buildings. This document explains what is eligible for CDBG assistance, how a national objective can be met, and the considerations that will make a Community Development Fund I or II application competitive for such projects.

Eligibility

Title I of the Housing and Community Development Act of 1974, as amended, includes an extensive list of activities eligible for CDBG assistance. At Section 105(a)(5) of Title I, architectural barrier removal projects are eligible within the following parameters:

Special projects directed to the *removal* of material and architectural barriers, which restrict the mobility, and accessibility of elderly and severely disabled adults.¹

Elsewhere in Title I, Congress extended the provisions of Section 504 of the Rehabilitation Act of 1973 to programs and activities financed in whole or in part with CDBG funds. [See Section 109(a).] It is very important for communities to understand that whether or not a CDBG-assisted activity is specifically directed to the “removal of material and architectural barriers,” **all CDBG-assisted activities must be carried out in such a way that services and programs are accessible to disabled persons.** Even if ADA had never been enacted, federally assisted projects are still required to comply with Section 504.

For example, if a community uses CDBG funds to pay for public social services, the services must be provided in a manner that makes them as accessible to disabled persons as they are to non-disabled persons. Commercial façade programs must consider readily achievable access in the design of a rehabilitation project. In this context, however,

¹ Persons are classified as having a severe disability if they: (a) used a wheel-chair or had used another special aid for six months or longer; (b) are unable to perform one or more “functional activities” or need assistance with an “ADL or IADL”; (c) are prevented from working at a job or doing housework; or (d) have a selected condition including autism, cerebral palsy, Alzheimer’s disease, senility or dementia, or mental retardation. Also, persons who are under 65 years of age and who are covered by Medicare or who receive SSI are considered to have a severe disability. NOTE: For purposes of this definition, the term “functional activities” includes seeing, hearing, having one’s speech understood, lifting and carrying, walking up a flight of stairs, and walking. An ADL is an “activity of daily living” which includes getting around inside the home, getting in or out of bed or a chair, bathing, dressing, eating, and toileting. An IADL is an “instrumental activity of daily living” and includes going outside the home, keeping track of money or bills, preparing meals, doing light housework, and using the telephone.

readily achievable access is not based on ADAAG, but the Uniform Federal Accessibility Standards (UFAS) that were promulgated under Section 504 of the Rehabilitation Act of 1973. Communities may (and are encouraged to) use ADAAG as compliance standard for CDBG-assisted public and private facilities because doing so ensures compliance with UFAS, and in the long run will better equip recipients to meet their civil rights obligations under the Americans with Disabilities Act.

Accessibility compliance can be confusing for local officials, service providers, and small businesses because there are different sets of rules for different projects, or for the same type of activity in publicly versus privately owned buildings. It is vital to note that construction and rehabilitation projects are governed by a number of overlapping codes and regulations, all of which must be complied with but all such compliance activities may not be an eligible CDBG expense. It is also important to note that all CDBG-funded public facilities projects, whether or not they are specifically intended as architectural barrier removal, are governed by ADA and the regulations of the Massachusetts Architectural Access Board.

Regulations and codes that must be taken into consideration

- Section 504 is triggered by federal assistance to a program or project. If there is no federal funding involved, Section 504 does not apply.
- ADA is a civil rights law that places a compliance burden on public and private entities regardless of whether they receive any federal assistance. As such, it is enforceable through the federal courts on both statutory and constitutional grounds. Complaints may be taken into court on behalf of aggrieved parties with standing by the U.S. Justice Department.
- The Massachusetts Architectural Access Board (AAB) oversees a *building code*. It is enforced locally by building inspectors. The AAB rules are generally triggered by the cost of improvements to an existing building, and by all new non-residential construction as well as residential uses involving a certain number of dwelling units. Communities may seek waivers from the AAB regulations. Application must be made directly to the AAB itself and are not issued by local building inspectors. Instead, the AAB itself has jurisdiction over regulatory variances. Because they will affect the scope of the project, such waivers should be sought prior to applying for CDBG funding.
- State and Local building, plumbing, electrical and fire safety codes, enforced by local building inspectors and fire marshals, must be met in order to receive building permits or certificates of occupancy.

In particular, while all building codes must be met in a construction project, **compliance with most codes cannot be considered as directly related to removing existing architectural barriers.** In most instances, work required to meet these codes, even

though it may be closely associated with or required in order to receive a permit for the barrier removal project, is not eligible under architectural barrier removal. For example:

1. A town hall currently has only one bathroom with a single toilet. Based on current and proposed occupancy, the plumbing inspector has determined that five toilets are required. The architectural barrier removal portion of the project is restricted to expansion of the bathroom to accommodate a wheelchair and the purchase and installation of the replacement toilet and sink (if existing). If the community elects not to use a unisex accessible bathroom but incorporate accessible features in two new gender-specific bathrooms, a pro-rated portion of the costs may be CDBG-eligible; the community should consult with CDBG staff prior to initiating design. In most cases the additional fixtures and plumbing, that is, beyond those necessary to remove the existing barriers, and upgrades or improvements to existing plumbing, will not be CDBG-eligible costs.
2. A building to be provided with an elevator currently has a single means of egress. In order to get a building permit or certificate of occupancy a second means of egress is mandated. While the town can upgrade the existing stairway to meet the access codes, construction of a new stairway is not eligible as architectural barrier removal, even though the barrier removal project may not otherwise receive a building permit. Similarly, if two means of egress currently exist, even if they do not themselves meet the fire codes, construction of an additional fire-code compliant egress is not eligible as barrier removal. Finally, in those rare instances that a community can demonstrate to the satisfaction of DHCD that from engineering, cost or historic preservation perspectives the only appropriate location for a new elevator would require the demolition of a compliant second means of egress, inclusion of a new stairway in a barrier removal project can be considered. In such instances prior consultation with CDBG staff is strongly recommended.

It should be noted that all new construction, including additions to existing buildings, must be built in such a manner as to fully meet the AAB regulations. All features, such as bathrooms, must be built fully accessible, even if the building already contains such features. **Therefore, work to make additions accessible as they are being constructed is not eligible as architectural barrier removal.** Note that not all work required in order to meet the AAB's requirements for full access constitutes architectural barrier removal.

Below are some examples of CDBG-eligible barrier removal activities.

- Installation of a wheelchair lift or an elevator in a public building, or a private facility that provides public services
- Installation of a ramp into a public building, and related entranceway modifications

- Rehabilitation of public restrooms in a town hall, a library, or a multi-service center in order to make them accessible to severely disabled patrons (upgrades to existing plumbing systems are not eligible, even as part of eligible barrier removal activities)
- Installation of special signage and communication devices to assist visually or hearing impaired persons, including entrance and exit signs, fire alarms or smoke detectors, international symbol signage to identify handicapped accessible restrooms (upgrades to existing electrical systems, except in the instance where such service is required to run an elevator or chair lift, are not eligible)
- Installation of an entry ramp, entry and interior path of travel modifications to a three-unit rental property in which a ground-floor unit is also accessible, or made accessible as part of a housing rehabilitation activity
- Installation of automatic door-opening devices
- Interior modifications including widening of doorways, path-of-travel changes to accommodate forward, rear, and turning radius wheelchair movement
- Installation of curb cuts, sidewalk ramps and related traffic, parking and pedestrian signage designed to remove access barriers for the elderly and severely disabled adult
- Programs that assist commercial property owners to remove architectural barriers in storefronts and inside their buildings, such as entry ramps, automatic door-opening devices, communication systems, interior realignments designed to achieve wheelchair mobility

Although CDBG assistance is normally prohibited in buildings for the general conduct of government, projects that are limited to the removal of architectural barriers in a town or city hall can be CDBG eligible.

National Objective

A project designed to remove material or architectural barriers categorically meets the national objective of benefit to low and moderate-income persons as a limited clientele activity. The applicable regulation is at 24 CFR Part 570.483(b)(2)(iii):

A special project directed to removal of material and architectural barriers which restrict the mobility and accessibility of elderly or to publicly owned and privately owned non-residential buildings, facilities and improvements, and the common areas of residential structures containing more than one dwelling unit.

A caveat on national objective compliance

An activity that includes both architectural barrier removal and general rehabilitation will not meet the national objective as a “special project directed to removal of...barriers” unless the other rehabilitation work is directly necessitated by accessibility modifications. As a rule, rehabilitating a public facility (or any building) beyond the scope of barrier removal must meet a national objective in its own right. This means that the facility must either:

- Serve a population that is 51% or more low and moderate income [proven by one or more of the other limited clientele benefit methods enumerated in 24 CFR Part 570.483(b)(3)], or
- Serve an area where the residents are 51% or more low and moderate income persons, or
- Be integral to eliminating blighting conditions in a target area.

Program Design Considerations: Accessibility in Public Buildings

CDBG eligibility and national objective compliance are based on removing existing barriers in publicly or privately owned non-residential buildings. New construction must be done in a way that does not create barriers; therefore, except for items such as elevator shafts, new construction as a method for removing existing architectural barriers is not an eligible CDBG activity.² The focus here is on existing structures and facilities. Because of this, a community must be diligent in terms of identifying the programs and services that are (a) most needed by handicapped and elderly persons and (b) most constrained by

²In Massachusetts, all new non-residential construction must comply with handicapped access laws and the Architectural Access Board’s building codes. It is possible to show that achieving access in an existing building requires an expansion in addition to building alterations. How access is achieved depends on the features and constraints of the facility with architectural barriers. If new construction is contemplated consultation with CDBG staff is strongly recommended.

physical barriers. Unless a community plans to spend an enormous amount of money on architectural barrier removal, the project will probably not produce a completely barrier-free building. Instead, the result will be “readily achievable” access given local needs and available funds.

It is *critical* that applicants for accessibility dollars complete the ADA Self-Evaluation and the Transition Plan, both because this will allow the community to evaluate and prioritize proposed projects and because DHCD has made compliance with these statutory requirements a threshold for funding. The Self-Evaluation will identify the barriers to equal access to municipal programs and services and the Transition Plan will lay out the steps, including building modifications, which must be undertaken to achieve equal access. The Transition Plan will also allow communities to publicly set priorities for the order in which programs, services and buildings will be brought into compliance. In developing both the Self-Evaluation and the Transition Plan communities should seek out and incorporate disabled and elderly persons not only to identify buildings with the most significant barriers in a community, but also to consult throughout the planning and execution of a barrier removal activity. *Applicants must have included such an activity in their Community Development Strategy, and have completed an ADA Transition Plan as well as a Section 504 Self-Assessment in order to meet threshold for any architectural barrier removal project in the Community Development Fund.*

Many communities have disability commissions today because of ADA. It would be very helpful to have included commission members or other representatives of the elderly and disabled communities in the development and implementation of the Self-Evaluation and the Transition Plan to ensure both that their needs are being met and to minimize the potential for a non-compliance challenge over access barriers in a public building. If the local disability commission does not have any disabled or elderly members, consideration should be given to bringing on additional participants or holding special “focus groups,” conducting surveys or using other available means to obtain and consider input from the people who are most affected by the proposed project.

If the building to be modified is also historically significant, there are other parties who should be involved in the decision making process. They include -- at least -- the local historical commission and the State Historic Preservation Officer at the Massachusetts Historical Commission. There may also be a private, non-profit historic preservation group that will be concerned with how the important architectural features of a building are changed as a result of barrier removal.

Finally, a substantial project in a public or private building, regardless of whether it is directed at barrier removal, will probably require compliance with the regulations of the state Architectural Access Board (AAB). The local building inspector should be consulted to determine whether AAB requirements must be met in addition to the accessibility standards of UFAS or ADAAG. Unlike the federal guidelines that implement Section 504 or ADA, the state Architectural Access Board administers a building code. It takes effect when the total cost of building improvements exceeds

certain thresholds. The regulations of the Architectural Access Board covering existing buildings can be found at 521 CMR 3.3, which states in part:

If the work being performed amounts to less than 30% of the *full and fair cash value* of the *building* and

- a) if the work costs less than \$100,000, then only the work being performed is required to comply with 521 CMR, or
- b) if the work costs \$100,000 or more, then the work being performed is required to comply with 521 CMR. In addition, an *accessible* public *entrance* and an *accessible* toilet room, telephone, drinking fountain (if toilets, telephones and drinking fountains are provided) shall also be provided in compliance with 521 CMR.

If the work performed amounts to 30% or more of the *full and fair cash value* of the *building* the entire *building* is required to comply with 521 CMR.

Where the cost of constructing an *addition* to a *building* amounts to 30% or more of the *full and fair cash value* of the existing *building*, both the *addition* and the existing *building* must be fully *accessible*.

DHCD strongly recommends that you obtain a copy of AAB's regulations from the State House Bookstore and consult them early in the project planning. It is also worthwhile to call AAB and consult with staff. *It can be difficult to obtain a variance from the state code and do not assume that one will be granted. If there is a question in DHCD's mind as to whether a variance is required an application may lose points on "Readiness to Proceed" or fail the "Feasibility" threshold.*

After identifying all of the groups or individuals who may have an interest in the project, the community should convene a planning meeting. Several sessions may be necessary to resolve conflicts. Once there is general consensus about the acceptable scope of the project, modification alternatives, and an understanding of all of the rules that must be met to achieve the desired level of barrier removal, the community should seek out architectural services in order to translate goals into design plans and construction specifications.

Architectural services are an eligible CDBG cost. In cases where national objective compliance is based on removal of architectural barriers (such as in town halls) and the scope of the work includes elements that go beyond strict barrier removal, CDBG funds can only be used to pay for the design of the eligible barrier removal portion. Bid-ready plans and specifications are required in order to apply for public facility or barrier removal projects of \$100,000 or more. Communities may apply for CDBG funding for these plans in one year and for construction funding based on those plans in a subsequent year;³ applicants for design funds should be sure to differentiate between barrier removal and other proposed rehabilitation or code compliance work in their application.

³ It should be noted that Mass CDBG requires that the construction of projects designed using CDBG funds be completed within five years of the completion of the design activity. Please refer

Project Evaluation

Removal of architectural barriers in and of itself does not necessarily make services and programs accessible to disabled and elderly persons, especially those for whom disability is not mobility-related. While such considerations should be part of the Self-Evaluation and Transition Plan, the results of a barrier removal activity should be evaluated to determine what other, non-bricks-and-mortar changes need to be made in order to accommodate the accessibility needs of various groups. Sometimes, it takes eliminating architectural constraints to see that programmatic strategies still need to be undertaken by the community or the organization that owns a “public accommodation” facility. Success in this area will be greatly enhanced by providing effective opportunities for disabled and elderly persons to shape the design of a building accessibility project from the very beginning.

Procurement of Design and Construction Services

The process for hiring an architect is governed by the Massachusetts Designer Selection Law. The community is required to use a Designer Selection Committee to evaluate architectural proposals, rank-order the competing firms and as a rule, select from the top three. Mass. CDBG recommends that you obtain a copy of a publication produced by the state Office of the Inspector General entitled, *Designing and Constructing Public Facilities*, for specific guidance on the designer selection process in Massachusetts.

The RFP should not only require evidence that the architect or firm meets these minimum requirements, but the names and addresses of appropriate contact persons in the client communities to find out how the architect performed, how well he or she worked with local constituencies, and whether any problems came up during the project. The architect hired will be the most important ally in the accessibility design process. This means selecting someone who is comfortable with citizen groups, can stick by a timeline, knows all of the regulations that will come to bear on the project, and doesn't say “it can't be done” unless it *really* can't be done!

Once the design phase is complete, issuing construction plans and specifications in order to hire a general contractor to do the requisite work will be done. In some instances, the community may be seeking equipment and installation bids -- for example, to retrofit and install a wheelchair lift in a town building. Collaboration with the architect, the town's procurement officer, Town Counsel or the City Solicitor, and the individual who will be responsible for overseeing the project will ensure that the bid documents include all required federal and state contract provisions. Mass. CDBG requires that the

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“boilerplate” construction contract be used for this purpose, modified as appropriate by the Town Counsel or on the recommendation of the architect.

The construction process for accessibility projects in public buildings is the same as that described in the FY 2005 Massachusetts CDBG *Infrastructure and Public Facilities With CDBG* Technical Assistance Guide. In general, the project implementation plan must account for these steps:

- Procurement and award for designer services
- Architectural design (or engineering) phase(s)
- Preparation of plans, specifications and bid documents
- Construction bidding
- Contract award
- Pre-construction conference
- Construction phase - labor standards/wage and payroll monitoring
- Inspections to pay invoices
- Final inspections and contract monitoring
- Retainage held - final retainage released
- Close-out

Special Considerations for Designer Selection

The process for procuring design services and procuring construction services is outlined below. Some special considerations should be noted in selecting architects for barrier removal projects. Given the fact that not only the federal ADA Accessibility Guidelines, but also the building code requirements of the Architectural Access Board govern these projects as well, it is vital that architect have previous experience with accessibility design in public buildings in Massachusetts. If the building is on or eligible for listing on the National Register, also include a selection criterion that requires previous experience with historically significant buildings, National Register eligibility, and the process by which the State Historic Preservation Officer can determine that strict adherence to ADAAG will have an *adverse effect* on the building. Ideally, the selected architect will have qualifications:

- A Registered Architect in the Commonwealth of Massachusetts
- Experience designing architectural barrier removal modifications in at least three comparable *public buildings* in Massachusetts (preferably, more than three)
- Experience rehabilitating and designing architectural barrier removal modifications in historically significant buildings

- Experience with federally funded building construction/rehabilitation projects (at least three)

Relying on these qualifications (and others that are important) will ensure that the architect chosen by the communities Designer Selection Committee:

- is properly licensed to provide the services you need
- has experience with state Architectural Access Board regulations and the Massachusetts Building Code; state construction procurement laws governing public buildings; state prevailing wage rate requirements; and other applicable requirements
- has experience with historic preservation principles, how to accommodate both preservation and accessibility in older buildings, and ideally, has worked on a project requiring a Certificate of Appropriateness from a local historic district commission
- has experience with Federal Labor Standards, federal procurement rules, and Section 504

Procurement Considerations: Privately Owned Buildings

A key distinction between the requirements for accessibility modifications in public buildings and private buildings involves the contract awarding authority. When using CDBG or other funds to work on a public building, the municipality is awarding design and construction contracts and must meet a host of requirements that are unique to public procurement and the types of facilities involved. However, modifications to a privately owned building, such as a non-profit organization's social service center or a commercial property in the downtown, usually involves a contract between two private entities -- the property owner, and the contractor. In such cases, state procurement laws will not apply. State prevailing wage requirements are triggered by the award and execution of a contract by a public entity. Federal wage rates are triggered by the use of federal funds on a construction project.

In privately owned buildings, procurement and contracting are governed by federal regulations found at 24 CFR Part 85. State prevailing wage rates do not have to be considered so long as a private property owner and contractor execute the construction contract. However, federal wage rates required by the Davis-Bacon Act must be paid for all on-site labor in any construction contract of \$2,000 or more. Construction bid documents must incorporate the DHCD boilerplate construction contract, which includes this rule, and project implementation plan must account for a process by which federal wage rate compliance is monitored and enforced.

Many of the other suggestions made in the previous section on architect selection should be incorporated into the planning process for accessibility in private buildings, too. At

the very least, an architect who is familiar with the state Architectural Access Board regulations has experience with federally funded construction projects and knows Title III of the Americans with Disabilities Act should be sought. If the private building is historically significant, or if it is located in a local historic district, both subgrantee and recipient should hire an architect with preservation training as well. *Knowledge of both ADA and historic preservation are absolutely critical to a successful accessibility project in a historically significant building.*